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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-485

GEORGE I. NORMAN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 58(2) of the Rules of this Court, the petitioner, George I. Norman, Jr., hereby petitions this Court for rehearing of its order dated January 8, 1973, denying Norman's petition for a writ of certiorari.

In a supplement to his petition for the writ, Norman urged the Court to consider the divergence of views between the Courts of Appeals for the Second and Tenth Circuits in the interpretation of 18 U.S.C. § 656, which prohibits the "willful misapplication" of bank monies. Norman pointed to the Second Circuit's recent decision in *United States* v. *Docherty*, 468 F.2d 989 (2d Cir. 1972). There, the court of appeals, in a significant opinion by Chief Judge Friendly, substantially altered its reading of § 656, as previously applied in *United States* v. *Fortunato*, 402 F.2d 79 (2d Cir. 1968),

cert. denied, 394 U.S. 933 (1969), and reversed a conviction with instructions to dismiss the indictment.

But *Fortunato,* from which the Second Circuit has retreated in *Docherty,* underlay the rulings in the courts below that Norman was guilty of aiding and abetting a violation of § 656. The decision on which the Tenth Circuit relied to sustain Norman's judgment of conviction has thus been all but abandoned in the Second Circuit, where it was initially promulgated.

A recent decision by the Court of Appeals for the Tenth Circuit, which did not come to the attention of Norman's counsel until after this Court denied certiorari in his case, demonstrates that Norman's position is not unique, but that the problem he faces appears to be a recurring one. In *United States* v. *Acree,* 466 F.2d 1114 (10th Cir. 1972), the Tenth Circuit has again invoked the *Fortunato* precedent in sustaining a conviction under § 656. There, the defendant-appellant urged that his conviction be set aside because the government failed to show that the subject bank sustained a loss.* Acree's defense rested on the contention that he acted for the ultimate good of the bank, and that the bank could have benefited in the long term by his conduct. The court of appeals rejected this contention:

> "The ultimate or future possibility or probability of benefit to the bank is *not a defense* to a misapplication of funds at the time of [the transactions complained of in the indictment] .... The offense occurred and was complete when the misapplication took place. What might have later happened as to repayment *is not material and could not*

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* This Court denied Acree's petition for a writ of certiorari on January 22, 1973. — U.S. —, 41 U.S.L.W. 3410. The petition did not present any question concerning the conflict posed by the Second Circuit's *Docherty* decision.

be a defense." 466 F.2d, at 1118 (emphasis supplied).

Thus, the Tenth Circuit takes the position that a "misapplication" takes place—in its words—"when it takes place." This circular reasoning, which excludes any consideration of the reasonable unlikelihood of loss by the subject bank, flies in the face of the Second Circuit's analysis in *Docherty*. Judge Friendly there wrote:

> "As to defrauding, even if we assume *arguendo* that failure to disclose the true recipient of the proceeds was a misrepresentation, *the case lacks the element of foreseeability of damages essential even for a civil suit* ... Indeed, there will be no damages at all from the transactions in which Docherty took part, if, so far as the record shows, the notes are collectible. *Beyond this we are by no means convinced that, when Congress speaks of intent to defraud in a criminal statute, it means merely the attitude of mind that would support a civil action.*" 468 F.2d, at 995 (emphasis supplied).

Thus, while the Second Circuit reads § 656 to require at least a showing by the government that the defendant has foreseen damage to the bank as a result of the transactions in which he has allegedly engaged, the Tenth Circuit has denied that evidence tending to disprove such damage is relevant.*

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* The Tenth Circuit's refusal to recognize the probative force of such evidence is especially significant in Norman's case. For information received by Norman's attorneys from the Federal Deposit Insurance Corporation ("FDIC") subsequent to this Court's denial of certiorari demonstrates that the government will surely show a profit on its acquisition of the assets of the Rocky Mountain Bank and subsequent collections on the bank's assets—even taking into account the FDIC's administrative expenses incurred in the process. The FDIC has also confirmed that the medical center

Such a divergence of views goes to the heart of § 656. That divergence will require ultimate resolution by this Court. Norman respectfully submits that he, along with others who suffer the anomaly of irreconcilable interpretations of a major federal criminal statute by the various courts of appeals, is entitled to this Court's judgment.

Respectfully submitted,

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Washington, D.C.

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building, the stock of whose controlling company was pledged to the bank as security for one of the Norman loans, is the largest of the several hundred unliquidated assets still held by the FDIC; that the property has been independently appraised on three occasions at amounts equal to or exceeding $500,000; that from the date of the FDIC's acquisition to December 31, 1972, the property has produced a net profit in excess of $80,000; and that the FDIC intends to sell the property this year for the benefit of the bank.

CERTIFICATE OF COUNSEL

The undersigned, a member of the Bar of this Court, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

GERALD D. STERN